No. 13103.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D. SALLEE,

Appellees.

Reply Brief for Appellees John W. Preston, Oliver O. Clark, and David D. Sallee.

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Opinion Below.

The district court did not write an opinion. Its findings and conclusions appear at pages 67-74 of the record. The opinion in this case on the former appeal is reported at 181 F. 2d 62.

Jurisdiction.

The district court had jurisdiction of the action under which this fee proceeding arose under the Act of August 15, 1894, 28 Stat. 286-305, as amended, 25 U. S. C. A., Section 345.

This Court has jurisdiction on appeal under 28 U. S. C. A., Section 1291.

Questions Presented.

The questions presented on this appeal are:

1. Whether this Court should disregard the law of the case as decided in *United States and Lee Arenas v. John W. Preston, et al.,* 181 F. 2d 62.

2. Whether the district court complied with the mandate of this Court in fixing the value of the allotted lands at $412,000 and attorneys' fees in the amount of $90,000.

3. Whether the district court erred in denying appellants' motion to amend the findings, conclusions and judgment to provide that appellees' fees be fixed by a percentage of the value of the allotted lands.

Statute Involved.

The statute involved is the Act of August 15, 1894, 28 Stat. 286-305, as amended, 25 U. S. C. A., Section 345, a copy of which appears at pages 3-4 of appellants' opening brief.

Statement.

This appeal is from a judgment of the district court awarding attorneys' fees to appellees in the amount of $90,000 for services rendered to Lee Arenas in an action to determine his right to an allotment of lands in severalty and a trust patent thereto. A former judgment for such fees was reversed by this Court, 181 F. 2d 62, on the grounds: (1) That the trial court should have fixed

the dollar value of the services rendered by appellees, and (2) that in fixing the dollar value of appellees' services the trial court should have considered and determined the value of the Indian's interest in the allotted lands "as one of the elements to be taken into consideration."

At the retrial of the fee proceeding the trial court fixed the value of the Indian's interest in the allotted lands at $412,000, and the dollar value of appellees' services at $90,000. The judgment impressed a lien upon the allotted lands to secure payment of the amount awarded, and allowed Lee Arenas six months after the date of entry thereof within which to pay the judgment. [R. pp. 75, 76.]

Summary of Argument.

1. Appellants are not entitled to a review of the law of the case as announced by this Court in *Arenas v. Preston,* 181 F. 2d 62.

2. The district court complied fully with the mandate of this Court at the second trial of this cause.

3. The district court did not err in denying appellants' motion to amend the findings and judgment to provide that appellants' fees be fixed on a percentage of the value of the allotted lands.

ARGUMENT.

I.

Appellants Are Not Entitled to a Review of the Law of the Case as Announced by This Court in Arenas v. Preston, 181 F. 2d 62.

The foregoing proposition of law is discussed fully in our brief in the companion case of *United States and Eleuteria Brown Arenas v. Preston, et al.,* No. 12962 in this Court, at pages 9-11 thereof, to which the Court is respectfully referred.

It is settled law that "when an issue is once litigated and decided, that should end the matter." (*United States v. U. S. Smelting etc. Co.,* 339 U. S. 186, 198.)

See also, to same effect:

Insurance Group Com. v. Denver & R. G. W. R. Co., 329 U. S. 607;

Messinger v. Anderson, 225 U. S. 436, 444;

Penzinger v. West Am. Fin. Co., 10 Cal. 2d 160, 169, and cases cited.

The question whether the district court has jurisdiction to impress a lien upon an Indian's restricted lands was squarely presented on the former trial and appeal. Both the trial court and this Court held that such jurisdiction existed. The Supreme Court denied certiorari. (*United States v. Preston,* 340 U. S. 819.)

Appellants' insistence that this Court review the law of this case is without merit, is contrary to the decisions of this Court and the Supreme Court, and is likewise contrary to established rules of law. Not one valid reason has been adduced for such a review. This case has run its course, and an end of it should be judicially declared.

II.

The District Court Complied Fully With the Mandate of This Court at the Second Trial of This Cause.

The evidence at the former trial (February 11, 1948, and subsequent dates) was before the Court at the second trial. [R. Vol. 1, p. 99 *et seq.*] Other evidence was also introduced and received at the second trial.

A. Evidence Concerning Value of Allotted Lands.

Joseph A. Gallagher and Benton Beckley testified, as to the value of the lands allotted to Lee Arenas, on behalf of appellees. Mr. Gallagher is a qualified expert on land values, being President of American Right of Way and Appraisal Contractors, and having had many years of experience in appraisal work. He was district land agent for the Los Angeles Department of Water and Power, project manager for the U. S. Engineers during World War II, and has held many other positions involving land appraisals. [R. pp. 104-110, *et seq.*] He appraised the Lee Arenas lands (94 acres) at the total sum of $1,047,000. [R. p. 183.] The evidence of this witness covers many pages of the record. It is sufficient to say that he gave good reasons, in detail, for the valuation placed on the Lee Arenas lands.

Benton Beckley has resided in Palm Springs for 11 years, and was a licensed real estate broker there during that period. He agreed with the valuations placed by Mr. Gallagher on the Lee Arenas land. [R. p. 198, *et seq.*]

Both of these witnesses testified that their valuations were on a fee simple basis. We shall discuss this later herein.

Donald C. Jones testified on behalf of appellants. He valued the Lee Arenas lands at a total of $87,800, in answer to a hypothetical question full of qualifications and limitations. [See question, R. pp. 431-433.] A mere reading of the question reveals that Mr. Jones believed the qualifications and limitations of and upon Arenas' title reduced the value of the lands to a figure so low as to be absurd.

At the first trial of this fee proceeding the Government's appraisers, Donald C. Jones and Bernard G. Evans, appraised the fee value of the Lee Arenas lands as follows:

Donald C. Jones, fee value [R. pp. 575-576.]	$245,000.00
Bernard G. Evans, fee value [R. pp. 604-605.]	$211,500.00

It is interesting to note that in a subsequent colloquy between the Court and Mr. Brett, government counsel, the latter stated that the land was worth from $186,000 to $190,000. [Supp. typed transcript, p. 29.] Mr. Ennis, personal attorney for Lee Arenas, valued the land at $400,000 to $450,000. [Supp. Tr. p. 47.]

Obviously, the evidence on value was conflicting. The trial court did not err in finding the value to be $412,000. Moreover, the trial Judge stated that he had often been in Palm Springs, some times as long as 30 days, and that he had personal knowledge as to the Lee Arenas lands. He certainly was conservative in the valuation placed on the lands. [Supp. Tr. p. 19.]

B. The Trial Court Properly Admitted Evidence of Value Based Upon Title in Fee Simple.

Appellants complain here, as in the *Eleuteria Brown Arenas* case, that the trial court erred in admitting evidence of value based upon fee simple title. This question is fully discussed in appellees' opening brief in appeal No. 12962, at pages 11-15, to which the Court is respectfully referred.

> "The restraint on alienation must not be exaggerated. It does not of itself debase the right below a fee simple." (*United States v. Paine Lumber Co.,* 206 U. S. 467, 473.)

> "The virtual fee is in the allottee, with certain restrictions on the right of alienation." (*United States v. Minnesota,* 113 F. 2d 770, 773; *United States v. Oklahoma G. & E. Co.,* 127 F. 2d 349.)

> "While the Government retains the legal title in trust for the Indian, the title of the Indian, except for the limitation against alienation, is, in reality, a title in fee simple." (*Eastman v. United States,* 28 Fed. Supp. 807, 808.)

> "The right of perpetual and exclusive occupancy of the (restricted) land, is not less valuable than the full title in fee." (*United States v. Shoshone Tribe of Indians,* 304 U. S. 111, 116, and cases cited.)

> "If 'Indian title' is something less than a fee simple, then in cases of involuntary alienation damages should be based upon something less than the value of the land itself. Yet the courts hold that in such cases the value of the land is the measure of damages." (Cohen's Handbook of Federal Indian Law 321.)

To the same effect:

Choate v. Trapp. 224 U. S. 665;

Leavenworth etc. Co. v. United States, 92 U. S. 733, 742;

Beecher v. Weatherby, 95 U. S. 517, 525.

The trial court did not err in receiving evidence of the fee simple value of the lands. Moreover, it is to be noted that the finding of value is little more than one-third of the valuation placed thereon by Gallagher and Beckley, and about the same as the value placed on the lands by Mr. Ennis, personal counsel of Lee Arenas.

Since value of the lands was only one of the elements to be considered in valuing appellees' services, it is difficult indeed, to understand the great emphasis placed thereon by appellants.

C. The Fee Allowed Is Reasonable.

At the former trial of this proceeding Messrs. T. B. Cosgrove and L. R. Martineau, Jr., testified as to the value of appellees' services in this case. They placed their valuations of such services at 27½% of the value of the property. The Court found the value of the property to be $412,000, and 27½% of that amount is $113,300. The amount awarded as fees is $90,000.

The amount thus awarded is in line with the value placed on appellees' services by Mr. Ennis, the personal attorney of Lee Arenas, who stated to the trial court that such "services are worth somewhere around $100,000." [Supp. Tr. p. 49.]

Mr. Brett, Government counsel, stated to the Court, in respect to the fee, "that a leeway of from $35,000 to

$50,000" was reasonable. [Supp. Tr. pp. 31-32.] In this connection he stated that appellees had "practically performed a miracle when he got the Supreme Court of the United States to consider the 1907 (1917) Act as a mandatory act," and "more of a miracle when he got your Honor to agree with him and, in fact, he got two judges to agree with him and the Court of Appeals." [Supp. Tr. p. 33.] Mr. Brett stated further that he did not think the last mentioned services were compensable, but "If I am wrong in that, I would raise my estimate" as to size of fee. [Supp. Tr. p. 33.]

Appellee Oliver O. Clark stated to the Court that in his opinion the Lee Arenas lands could be fairly valued at $500,000. [Supp. Tr. p. 51.] After referring to the numerous trips that he and appellee John W. Preston had made to Washington in connection with the Arenas litigation, the period of about 11 years spent in the litigation, and other expenses, Mr. Clark said,

> "* * * if we should be paid only by Lee Arenas from his property the fee suggested by Mr. Brett, we would not recover the money we have actually paid out." [Supp. Tr. p. 54.]

The facts disclosed by the record show that the trial court obeyed the instructions of this Court on remand, and that the judgment for $90,000 is just and reasonable, considering the value of the Indian's property and the various elements entering into the placing of a reasonable value upon appellees' legal services rendered on behalf of Lee Arenas.

III.

The Trial Court Did Not Err in Denying Appellants' Motion to Amend Findings and Judgment to Provide for Fixing Appellees' Fees on a Percentage of the Value of the Allotted Lands.

It is clear that if the trial court had granted appellants' motion to amend the findings and judgment so as to provide fixing attorneys' fees on a percentage basis, the same error would have been committed that caused this Court to reverse the former judgment. The trial court very properly denied the motion.

Nor would the error have been cured by limiting the total recovery to $90,000. The vice of a fee fixed on a percentage of the value of the lands was pointed out in this Court's opinion in *Arenas v. Preston,* 181 F. 2d 62, at page 67: "It may be that the value of the percentage allowed for attorney's fees upon a finding of the property value, would prove either inadequate or grossly excessive." (*Id.*) The trial court closely followed this Court's instructions (1) by fixing "the dollar value of the services performed," and (2) "in so doing (by determining) * * * the value of * * * the allotted land under the trust patent, as one of the elements to be taken into consideration."

Conclusion.

The judgment is free from error and should be affirmed.

Respectfully submitted,

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,
Attorneys for Appellees.

APPENDIX.

In this appendix appellees present excerpts from the reporter's supplemental transcript which are pertinent to the citations thereto made under Point II of the Reply Brief. These excerpts are from statements made in open court on February 16, 1951, by Irl D. Brett, Special Assistant to the Attorney General; John M. Ennis, Esq., personal attorney for Lee Arenas; and Oliver O. Clark, one of the appellees herein.

Statements of Irl D. Brett.

"Well, your Honor, I have indicated that I believe the figure between $186,000 and $190,000, roughly, would be about the fee value (of the Arenas property)."

"I would say that, in my opinion, on that basis an attorney fee of $25,000 and $35,000, in my view, would be a fair fee for the services rendered in this case." [Supp. Tr. p. 29, lines 24-25; p. 30, lines 1-4.]

"Under those circumstances, I feel—I will put it this way: I would say, your Honor, that a leeway of from $35,000 to $50,000. I will go that far." [Supp. Tr. p. 31, lines 24-25; p. 32, line 1.]

"I do not want to lose track of this fact: Judge Preston, as I have told him personally and I told this court, I think, practically performed a miracle when he got the Supreme Court of the United States to consider the 1907 [*sic*] Act as a mandatory act. And I think he has performed more of a miracle when he got your Honor to agree with him and, in fact, he got two judges to agree with him and the Court of Appeals. But I do not agree that this last service is something that you can award him for here. If I am wrong in that, I would raise my estimate." [Supp. Tr. p. 33, lines 1-10.]

"Now, I have in mind, however, in my suggestion as to the fee—and I am rather in a difficult spot because I would say that it will be approved, whatever your Honor will do, so I am merely giving you my view as a lawyer—I have in mind two other things to consider. One is these two gentlemen who testified in behalf of the petitioners. And while I do not know Mr. Martineau too well, I know that he is a man of ability. I do know Mr. Cosgrove and have known him for years, and I esteem him very highly.

"Mr. Cosgrove figured the top, irrespective of what it might be, of 27½ per cent; and I think his testimony indicates that he considered the very factors your Honor had in mind, the uncertainty.

"Mr. Martineau stated expressly that he was considering it on a million dollar basis. He did not fix it in money. It was around $275,000, and his mathematics are around the same thing.

"Then I have in mind, too, this Equitable Trust case which counsel used as one of their principal authorities, in which they had certain difference, it is true, but they had certain respects similar to this matter. I believe the recovery there was around a million dollars, close to that. It was a liquid recovery as distinguished from this. Your Honor will recall that the Court of Appeals fixed a fee of $100,000 and the Supreme Court reduced it to $50,000.

"I realize money is different, but nevertheless, applying somewhat along those same percentages, I believe that, assuming that your Honor fixes a value of not in excess of $200,000, a fee of around $50,000 or maybe up to

27½ per cent would seem to apply those rules that those people have indicated to you." [Supp. Tr. p. 35, lines 9-25; p. 36, lines 1-14.]

"I do not want to depreciate the value of these men's services. As I say, I go very strong, I think, when I say I think they performed two miracles. I did not believe they would ever be able to get a lien against these Indian lands, but they did and I have to accept it." [Supp. Tr. p. 42, lines 9-13.]

STATEMENTS OF JOHN M. ENNIS.

"I wanted to be practical. I think my duty to my client is to see that he is charged, as nearly as I can see to that—he is charged an equitable fee. But I think also my duty is to see that the value of his land is not debased by some decision of this court because I did not say my say." [Supp. Tr. p. 46, lines 14-18.]

* * * * * * * * *

"I frankly believe the land is worth somewhere around $400,000 or $450,000. That is what I believe, but that is the opinion of an attorney who has gone to Palm Springs a few times, who has been in the nice parts of Palm Springs and the poor parts, and based upon a chronic pessimism here." [Supp. Tr. p. 47, lines 8-12.]

* * * * * * * * *

"On the other hand, it is not worth to me a million and a half dollars. I think it is worth $400,000 or $450,000. What should the fee be? I do not think I want to make a statement in dollars as to that. I have re-

ferred the court to this matter of Mr. Taheny's fee of $4,550, and the Court of Appeals believed that his affidavit was true and the statements of his services were true and they approved that application." [Supp. Tr. p. 47, lines 21-25; p. 48, lines 1-3.]

* * * * * * * * *

"However, we are bound by those other decisions. If Mr. Taheny's services were worth $4,500, of course, the petitioners here performed services worth somewhere around $100,000, if that value, based upon his rather elaborate affidavit, which, unfortunately I do not have a copy of here today; it is in the Court of Appeals' file and I had a copy of it, but whether these records contain a copy of it or not I do not know—but if that value is a close value, why, I believe the petitioners would probably be entitled to $100,000, assuming that is correct, your Honor." [Supp. Tr. p. 49, lines 21-25; p. 50, lines 1-5.]

STATEMENTS OF OLIVER O. CLARK.

"Our quarrel is with the Government of the United States. I know very well that if the client could speak, as Mr. Ennis has spoken, and the matter could be settled without the interference of the Government, there would not be any difficulty in their meeting together at all. And therefore I say to your Honor that my own personal judgment is that a fair value of this court, based upon all the evidence before the court, would be about $500,000." [Supp. Tr. p. 50, lines 19-25; p. 51, line 1.]

"* * * I feel that these things have been properly evaluated in the opinions that have been expressed here by Mr. Gallagher and by Mr. Beckley, and that their arguments on value are reasonable from the standpoint of an opinion, and I personally would depreciate it about $500,000 as a finding by a court resting upon a good sound basis.

"I think this, your Honor: That if we should be paid only by Lee Arenas from his property the fee suggested by Mr. Brett, we would not recover the money that we have actually put out. I personally have been in Washington, D. C., four times on this matter. Judge Preston has been there, I think, at least three times, and we have been engaged in the matter for 11 years come this next July.

"And I say that during that time the money that I have personally actually expended in traveling expenses and the maintenance of my office and otherwise would not be reimbursed to me by any such fee as Mr. Brett has fixed." [Supp. Tr. p. 54, lines 12-25; p. 55, lines 1-3.]